

.....X

[illegible]

0001 0002 0003 0004 0005 0006 0007 0008 0009 0010 0011 0012 0013 0014 0015 0016 0017 0018 0019 0020 0021 0022 0023 0024 0025 0026 0027 0028 0029 0030 0031 0032 0033 0034 0035 0036 0037 0038 0039 0040 0041 0042 0043 0044 0045 0046 0047 0048 0049 0050 0051 0052 0053 0054 0055 0056 0057 0058 0059 0060 0061 0062 0063 0064 0065 0066 0067 0068 0069 0070 0071 0072 0073 0074 0075 0076 0077 0078 0079 0080 0081 0082 0083 0084 0085 0086 0087 0088 0089 0090 0091 0092 0093 0094 0095 0096 0097 0098 0099 0100 0101 0102 0103 0104 0105 0106 0107 0108 0109 0110 0111 0112 0113 0114 0115 0116 0117 0118 0119 0120 0121 0122 0123 0124 0125 0126 0127 0128 0129 0130 0131 0132 0133 0134 0135 0136 0137 0138 0139 0140 0141 0142 0143 0144 0145 0146 0147 0148 0149 0150 0151 0152 0153 0154 0155 0156 0157 0158 0159 0160 0161 0162 0163 0164 0165 0166 0167 0168 0169 0170 0171 0172 0173 0174 0175 0176 0177 0178 0179 0180 0181 0182 0183 0184 0185 0186 0187 0188 0189 0190 0191 0192 0193 0194 0195 0196 0197 0198 0199 0200 0201 0202 0203 0204 0205 0206 0207 0208 0209 0210 0211 0212 0213 0214 0215 0216 0217 0218 0219 0220 0221 0222 0223 0224 0225 0226 0227 0228 0229 0230 0231 0232 0233 0234 0235 0236 0237 0238 0239 0240 0241 0242 0243 0244 0245 0246 0247 0248 0249 0250 0251 0252 0253 0254 0255 0256 0257 0258 0259 0260 0261 0262 0263 0264 0265 0266 0267 0268 0269 0270 0271 0272 0273 0274 0275 0276 0277 0278 0279 0280 0281 0282 0283 0284 0285 0286 0287 0288 0289 0290 0291 0292 0293 0294 0295 0296 0297 0298 0299 0300 0301 0302 0303 0304 0305 0306 0307 0308 0309 0310 0311 0312 0313 0314 0315 0316 0317 0318 0319 0320 0321 0322 0323 0324 0325 0326 0327 0328 0329 0330 0331 0332 0333 0334 0335 0336 0337 0338 0339 0340 0341 0342 0343 0344 0345 0346 0347 0348 0349 0350 0351 0352 0353 0354 0355 0356 0357 0358 0359 0360 0361 0362 0363 0364 0365 0366 0367 0368 0369 0370 0371 0372 0373 0374 0375 0376 0377 0378 0379 0380 0381 0382 0383 0384 0385 0386 0387 0388 0389 0390 0391 0392 0393 0394 0395 0396 0397 0398 0399 0400 0401 0402 0403 0404 0405 0406 0407 0408 0409 0410 0411 0412 0413 0414 0415 0416 0417 0418 0419 0420 0421 0422 0423 0424 0425 0426 0427 0428 0429 0430 0431 0432 0433 0434 0435 0436 0437 0438 0439 0440 0441 0442 0443 0444 0445 0446 0447 0448 0449 0450 0451 0452 0453 0454 0455 0456 0457 0458 0459 0460 0461 0462 0463 0464 0465 0466 0467 0468 0469 0470 0471 0472 0473 0474 0475 0476 0477 0478 0479 0480 0481 0482 0483 0484 0485 0486 0487 0488 0489 0490 0491 0492 0493 0494 0495 0496 0497 0498 0499 0500 0501 0502 0503 0504 0505 0506 0507 0508 0509 0510 0511 0512 0513 0514 0515 0516 0517 0518 0519 0520 0521 0522 0523 0524 0525 0526 0527 0528 0529 0530 0531 0532 0533 0534 0535 0536 0537 0538 0539 0540 0541 0542 0543 0544 0545 0546 0547 0548 0549 0550 0551 0552 0553 0554 0555 0556 0557 0558 0559 0560 0561 0562 0563 0564 0565 0566 0567 0568 0569 0570 0571 0572 0573 0574 0575 0576 0577 0578 0579 0580 0581 0582 0583 0584 0585 0586 0587 0588 0589 0590 0591 0592 0593 0594 0595 0596 0597 0598 0599 0600 0601 0602 0603 0604 0605 0606 0607 0608 0609 0610 0611 0612 0613 0614 0615 0616 0617 0618 0619 0620 0621 0622 0623 0624 0625 0626 0627 0628 0629 0630 0631 0632 0633 0634 0635 0636 0637 0638 0639 0640 0641 0642 0643 0644 0645 0646 0647 0648 0649 0650 0651 0652 0653 0654 0655 0656 0657 0658 0659 0660 0661 0662 0663 0664 0665 0666 0667 0668 0669 0670 0671 0672 0673 0674 0675 0676 0677 0678 0679 0680 0681 0682 0683 0684 0685 0686 0687 0688 0689 0690 0691 0692 0693 0694 0695 0696 0697 0698 0699 0700 0701 0702 0703 0704 0705 0706 0707 0708 0709 0710 0711 0712 0713 0714 0715 0716 0717 0718 0719 0720 0721 0722 0723 0724 0725 0726 0727 0728 0729 0730 0731 0732 0733 0734 0735 0736 0737 0738 0739 0740 0741 0742 0743 0744 0745 0746 0747 0748 0749 0750 0751 0752 0753 0754 0755 0756 0757 0758 0759 0760 0761 0762 0763 0764 0765 0766 0767 0768 0769 0770 0771 0772 0773 0774 0775 0776 0777 0778 0779 0780 0781 0782 0783 0784 0785 0786 0787 0788 0789 0790 0791 0792 0793 0794 0795 0796 0797 0798 0799 0800 0801 0802 0803 0804 0805 0806 0807 0808 0809 0810 0811 0812 0813 0814 0815 0816 0817 0818 0819

Dated: New York, New York
November 4, 2021

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	1
ARGUMENT	
A. MAGUIRE HAD A CONFIDENTIAL RELATIONSHIP WITH THE CITY	4
B. MAGUIRE RECEIVED CONFIDENTIAL AND PRIVILEGED INFORMATION REGARDING THE SUBJECT MATTER AT ISSUE IN THIS LITIGATION	4
1. The Deliberative Process Privilege	5
2. Maguire Gained Extensive Access to Confidential Materials and Materials Protected by the Deliberative Process Privilege, And His Contributions to the Corporation Counsel Report Are Likewise Protected by The Deliberative Process Privilege	6
3. The Confidential and Privileged Material Maguire Obtained is Directly Relevant to, and Indeed Pertained to The Subject Matter of This Litigation	8
C. THE PUBLIC INTEREST FAVORS DISQUALIFYING MAGUIRE.....	9
CONCLUSION.....	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Local 3621, Ems Officers Union v. City of New York</i> , No. 18-cv-4476 (LJL)(SLC), 2021 U.S. Dist. LEXIS 104810 (S.D.N.Y. June 2, 2021), <i>R&R adopted by</i> , 2021 U.S. Dist. LEXIS 126420 (S.D.N.Y. July 7, 2021)	3
<i>Auto-Kaps, LLC v. Clorox Co.</i> , No. 15-cv-1737 (BMC), 2016 U.S. Dist. LEXIS 37097 (E.D.N.Y. Mar. 22, 2016)	3, 8, 9, 11
<i>Brennan Ctr. For Justice at NYU Sch. Of Law v. U.S. Dep't of Justice</i> , 697 F.3d 184 (2d Cir. 2012)	5
<i>Dep't of Interior v. Klamath Water Users Protective Ass'n</i> , 532 U.S. 1 (2001)	5, 10
<i>Eastman Kodak Co. v. Kyocera Corp.</i> , No. 10-cv-6334 (CJS), 2012 U.S. Dist. LEXIS 132436 (W.D.N.Y. Sept. 17, 2012)	4, 9
<i>Grioli v. Delta Int'l Mach. Corp.</i> , 395 F. Supp. 2d 11 (E.D.N.Y. 2005)	3, 4
<i>New York Times Co. v. HHS</i> , No. 20-cv-3063 (GWG), 2021 U.S. Dist. LEXIS 6267 (S.D.N.Y. Jan. 13, 2021)	5
<i>Pellerin v. Honeywell Int'l Inc.</i> , No. 11-cv-1278-(BEN) (CAB), 2012 U.S. Dist. LEXIS 3781 (S.D. Ca. Jan. 12, 2012)	9
<i>Rodriguez v. Pataki</i> , 293 F. Supp. 2d 305 (S.D.N.Y. 2003), <i>aff'd</i> , 293 F. Supp. 2d 315 (S.D.N.Y. 2003)	3
<i>Tigue v. United States Dep't of Justice</i> , 312 F.3d 70 (2d Cir. 2002), <i>cert. denied</i> , 538 U.S. 1056 (2003)	7

PRELIMINARY STATEMENT

Plaintiffs have engaged Dr. Edward Maguire (“Maguire”) as an expert witness in support of their claims in this matter. Defendants oppose qualification of Maguire because he has a pre-existing confidential relationship with Defendants’ counsel and with defendant City of New York (“City”), pursuant to which he has received confidential and privileged information concerning the very issues which are the subject of this litigation. Because of this, and the public interest in maintaining judicial integrity as well as the integrity of government deliberations, this Court should disqualify Maguire as an expert.

STATEMENT OF FACTS

The facts relevant to this motion are described in the accompanying declarations of Gavin B. Mackie (“Mackie Decl.”) and Elissa B. Jacobs (“Jacobs Decl.”) and are summarized below for the Court’s convenience.

In December 2020, former Corporation Counsel James E. Johnson issued a report entitled “Corporation Counsel Report Pursuant to Executive Order 58 (June 20, 2020) Directing an Analysis of Factors Impacting the George Floyd Protests in New York City” (the “Corporation Counsel Report”). *See* Mackie Decl. Ex. A. Corporation Counsel Johnson enlisted the assistance of City attorneys (the “Review Team”) and outside experts, including Maguire, in preparing the Corporation Counsel Report. Mackie Decl. ¶¶ 4, 7. The Review Team and the experts reviewed a wide variety of materials, including a number of confidential internal documents retained by NYPD and other City agencies. *See* Mackie Decl. ¶ 6.

In the course of preparing the Corporation Counsel Report, Maguire had a confidential relationship with the Review Team and received a number of confidential documents and communications. As a condition of his employment, Maguire signed a Non-Disclosure Agreement (“NDA”) that required him to “keep all Confidential Information strictly confidential

and not disclose it to any person ...” and which required that he “shall not use any Confidential Information, except as required to work on” the Corporation Counsel Report. Mackie Decl. ¶¶ 8-9, *Id.* Ex C ¶ 2.a.-b. Further, Maguire in fact received a great deal of confidential information in connection with his work on the Corporation Counsel Report. Mackie Decl. ¶ 11. For example, Maguire “participated in discussions regarding the scope of the review and the strategies that the Review Team would pursue,” Mackie Decl. ¶ 12, “had access to and provided feedback on memoranda developed by the Review Team that summarized ACCs’ thoughts and impressions” regarding the material they reviewed, Mackie Decl. ¶ 13, and “reviewed and provided extensive feedback on drafts of the Corporation Counsel Report.” Mackie Decl. ¶ 14. Indeed, the review team considered Maguire “not just as an outside consultant but as an integral member of the team as it worked to develop policy recommendations.” Mackie Decl. ¶ 14.

On June 16, 2021, the People of the State of New York sent a letter to Defendants informing them of their intention to engage Maguire as an expert in the above-referenced litigation and requesting that Defendants inform them of our position regarding any conflict of interest. *See* Jacobs Decl. Ex. B ¶ 2. On June 23, 2021, Defendants informed them that there would be a conflict and attempted to resolve the issue without involving the Court. Jacobs Decl. ¶ 2. Ms. Jacobs attended a meet and confer with attorneys from the Office of the Attorney General on June 28, 2021 in an attempt to resolve the dispute. Jacobs Decl. ¶ 3. A second meet and confer was held on July 7, 2021. Jacobs Decl. ¶ 4. That meeting was attended by Ms. Jacobs, Karen Griffin, Chief Ethics Officer for the Office of Corporation Counsel, and attorneys from the Office of the Attorney General. Jacobs Decl. ¶ 4. The parties corresponded about the dispute and remaining factual issues via e-mail until July 15, 2021. Jacobs Decl. ¶ 5. No resolution was reached, and the Plaintiffs named Maguire as an expert on September 1, 2021. Jacobs Decl. ¶ 5.

ARGUMENT

This Court should disqualify Maguire as an expert because he has a prior confidential relationship with Defendants' counsel and defendant City that precludes him from working in a capacity antagonistic to the City on matters relating to the protests that occurred in May-June 2020, *i.e.* the subject matter of this litigation.

"The Court has the inherent power to disqualify an expert witness when such relief is warranted." *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 315 (S.D.N.Y. 2003) (citation omitted). "Disqualification is designed to protect the integrity of the judicial process by ensuring that experts do not use, even unwittingly, confidential information that they learned from a party in the course of an earlier engagement against that party in a later lawsuit." *Local 3621, Ems Officers Union v. City of New York*, No. 18-cv-4476 (LJL)(SLC), 2021 U.S. Dist. LEXIS 104810, at *10 (S.D.N.Y. June 2, 2021), *R&R adopted by*, 2021 U.S. Dist. LEXIS 126420 (S.D.N.Y. July 7, 2021) (citation omitted).

The courts of the Second Circuit have generally adopted a three-part test to consider whether an expert should be disqualified. The courts consider: "(1) was it objectively reasonable for the first party who retained the expert to conclude that a confidential relationship existed; (2) was any confidential or privileged information disclosed by the first party to the expert; and (3) does the public have an interest in allowing or not allowing the expert to testify." *Grioli v. Delta Int'l Mach. Corp.*, 395 F. Supp. 2d 11, 13-14 (E.D.N.Y. 2005). "To the extent the nature of the disclosures is disputed, courts also consider whether the confidential information revealed is relevant to the current litigation." *Auto-Kaps, LLC v. Clorox Co.*, No. 15-cv-1737 (BMC), 2016 U.S. Dist. LEXIS 37097, at *7 (E.D.N.Y. Mar. 22, 2016).

It is clear that Maguire had a confidential relationship with the City and that he received a large volume of confidential and privileged information directly related to the claims

and allegations in this litigation. Further, the public interest in preserving both the integrity of the judicial process and the government's ability to consult with experts as part of a confidential deliberative process favors disqualifying Maguire in this case.

A. Maguire Had a Confidential Relationship with the City

There can be no question that Maguire's employment as a consultant in the preparation of the Corporation Counsel Report established a confidential relationship. In general, the existence of a confidential relationship is not hard to establish, and courts in this Circuit have found a confidential relationship based only on an affidavit that asserted the expert agreed to maintain confidential information. *See, e.g., Eastman Kodak Co. v. Kyocera Corp.*, No. 10-cv-6334 (CJS), 2012 U.S. Dist. LEXIS 132436, at *25 (W.D.N.Y. Sept. 17, 2012) ("This sworn assertion is sufficient"). Here, Maguire in fact signed the NDA with the Law Department that specifically prevented him from disclosing any confidential information or from using it in connection with any other matter. *See* Mackie Decl. ¶¶ 8-9; *Id.* Ex. C. § 2.a.-b. Maguire agreed to be bound by the NDA as part of his work for the City and understood that he could not use the information he obtained in connection with his work on the Corporation Counsel Report in any future work engagements. *See* Mackie Decl. ¶¶ 8-10. This agreement and understanding clearly establishes a confidential relationship. *See Grioli*, 395 F. Supp. 2d at 13-14, *supra*.

B. Maguire Received Confidential and Privileged Information Regarding the Subject Matter at Issue in This Litigation

That Maguire received confidential and privileged information relevant to the issues in this litigation is also beyond dispute. *See Grioli*, 395 F. Supp. 2d at 13-14, *supra*. Specifically, Maguire's work as an outside consultant, including the activities described below and in the annexed Mackie Declaration, gained him access to voluminous materials protected by the deliberative process privilege.

1. The Deliberative Process Privilege

The deliberative process privilege extends to any “inter- or intra-agency document” that is “(1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, *i.e.*, actually related to the process by which policies are formulated.” *Brennan Ctr. For Justice at NYU Sch. Of Law v. U.S. Dep’t of Justice*, 697 F.3d 184, 194 (2d Cir. 2012) (quotation marks and citations omitted).

The deliberative process privilege “rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news, and its object is to *enhance the quality of agency decisions by protecting open and frank discussion* among those who make them within the Government.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (internal citations omitted) (emphasis added). The deliberative process privilege covers “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *New York Times Co. v. HHS*, No. 20-cv-3063 (GWG), 2021 U.S. Dist. LEXIS 6267, at *18 (S.D.N.Y. Jan. 13, 2021) (quoting *Klamath*, 532 U.S. at 8). Such documents may include: “recommendations, draft documents, proposals, suggestions, and other subjective documents...” *Id.* (citation and quotations omitted).

In his role as an outside consultant, Maguire obtained and reviewed these types of materials, as well as helped to generate and review the same, all of which are protected from disclosure by the deliberative process privilege.

2. Maguire Gained Extensive Access to Confidential Materials and Materials Protected by the Deliberative Process Privilege, And His Contributions to the Corporation Counsel Report Are Likewise Protected by The Deliberative Process Privilege

As set forth in the annexed Mackie Declaration, Maguire played a pivotal role in the development of all aspects of the Corporation Counsel Report, which required Maguire to receive far-ranging access to confidential and privileged materials. Indeed, “Maguire participated in discussions regarding the scope of the review and the strategies that the Review team would pursue” as well as “shap[ing] document requests” and “assist[ing] in developing framing questions.” Mackie Decl. ¶ 12. Maguire “participated in the Review Team’s internal deliberations and conversations at every step of the analysis.” *Id.* Maguire reviewed internal memoranda developed by the Law Department attorneys on the Review Team, which contained attorney thoughts and impressions in addition to confidential deliberations regarding potential policy recommendations, as well as work product produced by other independent experts. Mackie Decl. ¶ 13. Maguire also “reviewed and provided feedback on drafts of the Corporation Counsel Report,” Mackie Decl. ¶ 14, which, as this Court has already found, constitute internal deliberations regarding policy recommendations protected by the deliberative process privilege. *See* Memorandum and Order of Judge Gorenstein, No. 20-cv-8924, September 24, 2021, Document 271 at 3 (“[t]he OCC [Office of the Corporation Counsel] had a clear role in making recommendations to the Mayor . . . and [the outside consultant was] assisting OCC in making those recommendations”). In finding that documentation of another outside consultant’s review and feedback on drafts of the Corporation Counsel Report were protected from disclosure by the deliberate process privilege, this Court noted that, “a core reason for the generation of the OCC Report was to make policy recommendations to the Mayor and NYPD.” *Id.* This Court also observed that the deliberative process privilege applies as equally to government employees

engaged in policy-related deliberations and recommendations as to outside consultants retained by a government agency to assist with those same processes. *Id.* (citing *Tigue v. United States Dep't of Justice*, 312 F.3d 70, 77-79 (2d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003)).

Maguire received and reviewed other privileged material, such as internal memoranda developed by the Law Department attorneys on the Review Team, which contained attorney thoughts and impressions, as well as confidential deliberations regarding potential policy recommendations. Mackie Decl. ¶ 13. In sum, the Review Team treated Maguire “not just as an outside consultant but as an integral member of the team,” Mackie Decl. ¶ 14, and it “viewed [all] communications with Maguire as confidential.” Mackie Decl. ¶ 15.

Earlier this week, on November 2, 2021, this Court issued an Order granting Defendants’ motion to quash a subpoena served by Plaintiffs on another outside consultant who was retained by the Corporation Counsel to assist in preparation of the Corporation Counsel Report. *See* Order of Judge Gorenstein, No. 20-cv-8924, November 2, 2021, Document 310 (adhering to prior order granting Defendants’ motion to quash) (“Nov. 2 Order”). Defendants argued that Plaintiffs’ subpoena sought materials from that outside consultant that were protected by the deliberative process privilege, and this Court agreed. *Id.* In the Nov. 2 Order, the Court took note of evidence regarding that consultant’s participation in confidential and privileged activities with the Corporation Counsel Review Team, and/or activities that likely involved sharing of privileged and confidential material with the consultant, including “‘participat[ing] in discussions regarding the scope of the review and the strategies that [the Corporation Counsel] would pursue,’ ‘participat[ing] in . . . internal deliberations and conversations at every step of the analysis,’ and provid[ing] feedback on internal memoranda and drafts of the [Corporation Counsel] Report.” *Id.* at 1. As described above and in the annexed Mackie Declaration, Maguire engaged in these very

same activities while acting as an outside consultant for the Corporation Counsel, and in this manner was privy to a great deal of confidential and privileged information.

3. The Confidential and Privileged Material Maguire Obtained is Directly Relevant to, and Indeed Pertained to The Subject Matter of This Litigation

Moreover, the confidential and privileged information Maguire obtained in connection with his engagement with the Corporation Counsel Report is plainly relevant to the issues in this litigation. The Corporation Counsel Report “analyz[ed] factors impacting the protests that took place throughout New York City between the murder of George Floyd in late May 2020 through June 20, 2020.” Mackie Decl. ¶ 2. Before issuing the Corporation Counsel Report, the Review Team and its outside consultants conducted an analysis of the various “factors that may have impacted events at the protests.” Mackie Decl. ¶¶ 3-4. Documents reviewed during the course of the analysis included, among other things, multiple NYPD resources. Mackie Decl. ¶ 6. The confidential communications that Maguire received in the course of his participation in the process of developing policy recommendations included attorney memos containing thoughts and impressions regarding some of these NYPD resources. Mackie Decl. ¶ 13. These communications are all directly related to the subject matter of this litigation and to the work that Plaintiffs seek to have Maguire do in connection with this litigation. Mackie Decl. ¶ 16.

It is of no moment whether or not Maguire intends to disclose to Plaintiffs any confidential information that may have been provided to him as part of the Corporation Counsel Report. “[T]he inquiry is not into what confidential information the expert has disclosed, but what was disclosed to him.” *Auto-Kaps*, 2016 U.S. Dist LEXIS 37097, at *9 (emphasis in original). His conflict cannot be remedied, therefore, by an assertion from Plaintiffs that Maguire will not disclose information covered by the NDA or that he will review documents and events with a fresh eye. The fact that Maguire had a confidential relationship with Defendants and that he received

confidential and privileged information relevant to this lawsuit renders him ineligible to serve as an expert witness for Plaintiffs in this matter.

C. The Public Interest Favors Disqualifying Maguire

Public policy considerations also weigh in favor of disqualifying Maguire. In considering this factor, courts weigh “the public’s interest in preserving judicial integrity and fairness as balanced against the party’s right to the assistance of experts who possess specialized knowledge and the right of such experts to pursue their professional calling.” *Auto-Kaps*, 2016 U.S. Dist. LEXIS 37097, at *7.

As an initial matter, given the evidence that a confidential relationship existed and that relevant confidential information was disclosed to Maguire, this Court can assume the public interest in preserving judicial integrity prevails, absent any competing evidence. *See Auto-Kaps*, 2016 U.S. Dist. LEXIS 37097, at *14 (“[a]lthough the movant bears the burden of establishing the elements supporting its motion for disqualification, [opponent] has not presented evidence that would outweigh the public’s interest in preserving judicial integrity”).

Further, one cannot overstate the public interest in preserving judicial integrity as well as the governments’ ability to engage experts in a deliberative process without fear they will later reveal confidential information or use that information to the government’s disadvantage in a subsequent case involving the very issues for which they were retained. As to the former consideration, “[d]isqualification is designed to protect the integrity of the judicial process by ensuring that experts do not use, even unwittingly, confidential information that they learned from a party in the course of an earlier engagement against that party in a later lawsuit.” *Eastman Kodak Co. v. Kyocera Corp.*, No. 10-cv-6334 (CJS), 2012 U.S. Dist. LEXIS 132436, at *23-24 (W.D.N.Y. Sept. 17, 2012) (citing *Pellerin v. Honeywell Int’l Inc.*, No. 11-cv-1278-(BEN) (CAB), 2012 U.S. Dist. LEXIS 3781, at *8 (S.D. Ca. Jan. 12, 2012)) (rejecting “suggestion that [expert]

can parse his knowledge of [party's] confidential information to only rely upon what is provided to him in the litigation,” because “the human brain does not compartmentalize information in that manner”).

Moreover, the critical public interest served by safeguarding the government’s ability to engage trusted experts in confidential and privileged matters, such as assisting in deliberative processes in the course of internal investigations, is beyond debate. The Corporation Counsel’s investigation into and report on the NYPD response to the summer 2020 protests, which proffered recommendations for specific policy reforms, illustrates the obvious public benefit that inheres by ensuring the government’s ability to engage in uncensored self-scrutiny, bolstered by experts in their relevant fields, in order to improve an agency’s service to the public. The *raison d’être* of the deliberative process privilege is relevant here, because internal investigations and reports are most effective and beneficial to the public when agencies feel that they can engage in an “open and frank discussion” with the experts they retain without fear that their discussions will later be used against them, or “if each remark is a potential item of discovery and front page news.” *Klamath*, 532 U.S. at 8-9, *supra*. Allowing Plaintiffs to retain Maguire as an expert witness in this litigation would only dissuade the City and other government entities from relying on independent experts in future internal reviews for fear that those same experts would be used against them in litigation. Such a prospect is clearly contrary to the public’s interest, which is to promote and incentivize its public agencies to engage in those very sort of internal investigations and evaluations, and to retain the most qualified experts on point to assist in the process in order to maximize government efficiency and public benefits for all.

Finally, Plaintiffs cannot offer any countervailing interests to outweigh the public interest in judicial integrity and preservation of the deliberative process. First, Plaintiffs cannot

possibly argue that there are no other experts that they could retain to support their case. As valuable as his knowledge and experience is, Maguire is hardly the only expert on policing in the United States. Nor does Maguire possess any specific expertise valuable to Plaintiffs in this matter that could not be provided by other similar experts, aside from his confidential relationship as a consultant on the Corporation Counsel Report. Second, Plaintiffs cannot argue that Maguire will be “deprived of his professional calling.” *Auto-Kaps*, 2016 U.S. Dist. LEXIS 37097 at *14. Maguire is a valued expert in the field of policing, and Defendants have no intention of limiting his participation in cases that do not directly implicate the specific professional relationship for which he signed the NDA. He is free to pursue his scholarship and to serve as an expert for parties in any other litigation that does not involve the specific subject matter that was at issue in the Corporation Counsel Report and is now in issue in this litigation.


The public interest in preserving both the integrity of the judicial process and the government’s ability to consult with experts as part of a confidential deliberative process favors disqualifying Maguire in this particular case.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant Defendants' motion to disqualify Maguire as an expert witness in this litigation.

Dated: New York, New York
November 4, 2021

GEORGIA M. PESTANA
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street,
New York, New York 10007
(212) 356-2648

By: 
Jenny Weng
Senior Counsel
Special Federal Litigation Division